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FILED
MAR 18 1948

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 602

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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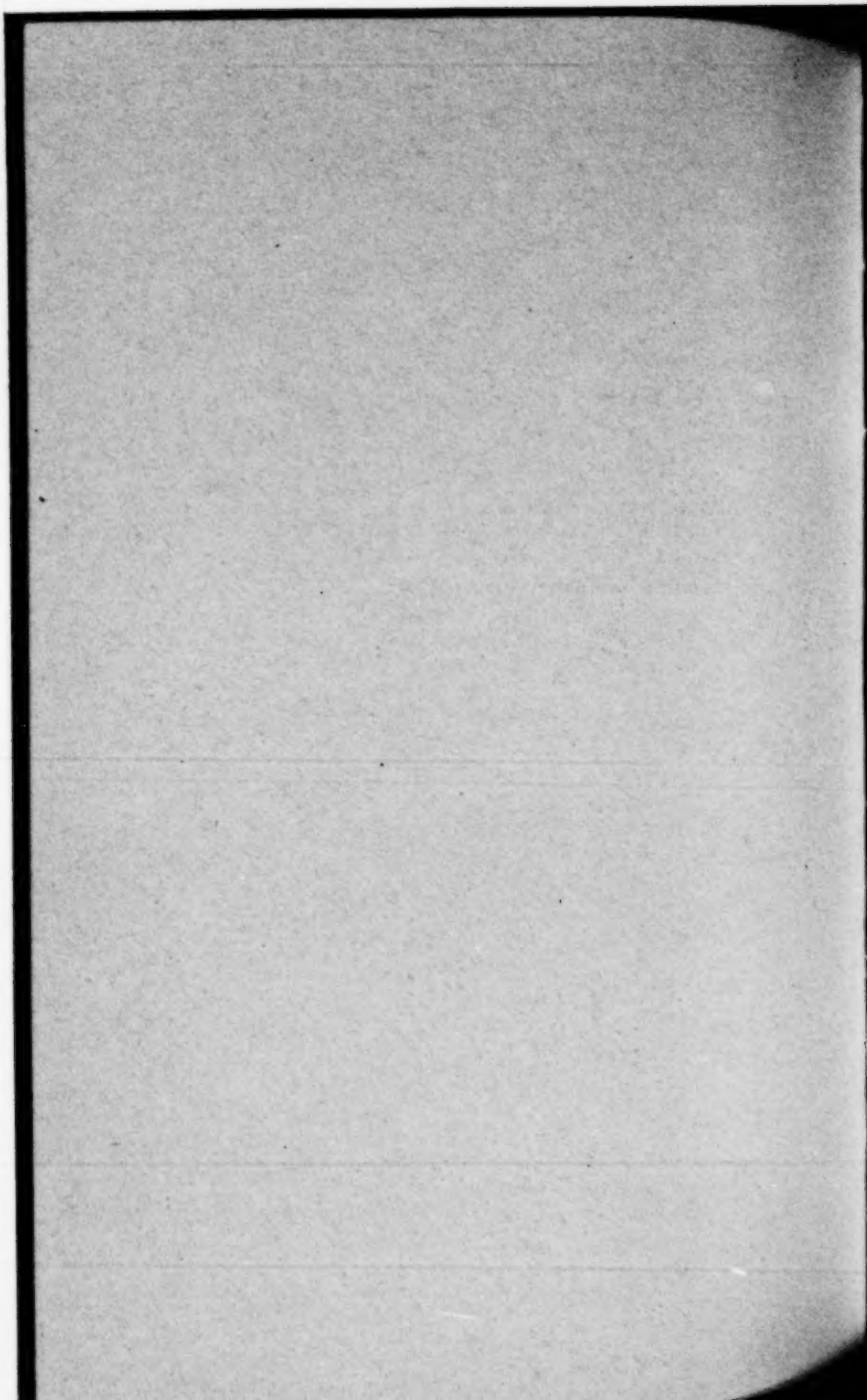

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Questions Presented

Under this heading, at its page 2, the Government seeks to combine Petitioner's Questions Presented I and II (Pet. 2), into a single Question Presented, purporting to deal restrictively with the subject of reversible error as on an appeal.

However, Petitioner's Question Presented I (Pet. 2) is much broader in scope, and is of fundamental significance, dealing, as it does, with denial of due process under the Fifth Amendment by reason of the circumstances presented, and hence cognizable on this Petition.

Petitioner's Question Presented II (Pet. 2) is also of fundamental significance, independently so, involving the consideration and interpretation of the so-called removal

statute, and the issue of efficacy, or supremacy, of Federal process, in the circumstances presented, and hence also cognizable on this Petition.

Nor does Petitioner merely request, as the Government infers (Page 2), a reviewal of the evidence as such, as on a motion for a new trial, to determine whether it was sufficient to support a finding that the property allegedly transported had a value of $5,000 or more. What Petitioner does seek here (Question Presented III, Pet. 2) is a ruling as to the standard, for jurisdictional purposes, to be applied in determining "value of $5,000 or more" in Section 415, National Stolen Property Act (Title 18, United States Code, Sections 413-19). Such issue is of far-reaching importance, its determination being vital for the guidance of the law enforcement agencies, both Federal and State, and of the Courts. This Court has not yet ruled, and the opinions of the Courts of Appeals are divergent (Petitioner's Brief 23), and fail to set forth any standard.

Statement of the Case

On its page 5, the Government states that its chief witness Banning testified that he and his colleagues always sold the jewelry to Petitioner. But the Government omits to mention the statement contained in a letter which Banning on June 27, 1943, wrote to his wife that "Abie Ginsberg from Minneapolis . . . was my fence, and they tell me he is dead, died about six months ago . . ." (R. 243).

At the bottom of its page 5, and top of its page 6, the Government presents a lengthy and irrelevant excerpt from the opinion of the Court of Appeals, as a part of its statement of facts, although the Transcript of Record, containing the evidence, is before this Court.

On its page 6 the Government states that "pursuant to agreement on September 7, 1,940 (R. 72), Banning, Sidran, and Graves went from Chicago to Detroit to search for a

jewelry salesman to rob." But the Government omits to add that the evidence further shows that such agreement was made by, and limited to, those three individuals (R. 72-77), Banning stating that "the three of us were sort of in conspiracy, I suppose, to come to Detroit" (R. 75).

Further, on its page 7, the Government asserts that Banning, Sidran, and Graves "met in Chicago the next morning, when the jewelry was shown and sold to Petitioner by Banning, Sidran and Graves in Banning's hotel room." But such statement is incomplete, and also incorrect, because Banning also testified that he did not deliver the merchandise to Petitioner (R. 94), and he could not say that it had been delivered to him (R. 94), and there is no evidence showing any such delivery.

Argument

1. The Government asserts, page 9, that it did everything within its power to secure the presence of Sidran and Graves at the trial, by obtaining writ of *habeas corpus ad prosequendum* from the United States District Court for the Eastern District of Michigan. But such assertion is not responsive, because that is precisely one of the issues presented here (Pet. 2, 7, 8, 18-21).

The Government asserts further at this point that there was no legal procedure available for compelling the officers of the State of Ohio to honor the second writ of *habeas corpus ad prosequendum*. Petitioner has already asserted (Pet. 19, 20) that such writ was a legal nullity and ineffective, and it naturally follows that its honoring was not compellable.

Ponzi v. *Fessenden*, 258 U. S. 254, cited Government's Brief 7, is authority for the proposition that under the principle of comity, the Federal Government may permit the transfer of a prisoner from Federal to State jurisdiction for trial under an indictment. The decision does not

appear to go further than that. Therefore, it is without relevancy here except as it confirms that "the penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt" (264).

In its first paragraph, page 10, the Government asserts, without authority citation, that the removal statute would have been available "only if the defendants were made amenable to the process of the Federal District Court in Ohio," and that such statute "makes no provision for release of persons from State to Federal custody." These statements are not responsive, in addition to being not clear, because it is the *scope of applicability of the removal statute* which is precisely in issue here also (Pet. 2, 7, 8, 13, 14, 18-21).

2. It is not correct, as asserted Government's page 10, that Petitioner does not question the sufficiency of the evidence to sustain his conviction for conspiracy. The fact is that issues submitted herein by Petitioner are of basic and far-reaching character, affecting and negating the evidence as a whole.

Nor is it correct, as asserted further Government's page 10, that there can be no doubt that the substantive offense was committed by the co-conspirators, in furtherance of the conspiracy. As previously observed (Pet. 24), the evidence does not show, nor is it alleged (R. 1-6), nor found (R. 470-78), that Petitioner was in Detroit at the time of the robbery. Knowledge of the latter, according to chief Government witness Banning, came to Petitioner for the first time in Chicago, after Sidran, Graves, and Banning had completed transportation to that city from Detroit (R. 74-6, 92). Moreover, as stated hereinabove, Banning testified that he did not deliver the merchandise to Peti-

tioner (R. 94), and could not say that it had been delivered to him (R. 94), and there was no evidence showing any such delivery. Accordingly, no evidence exists connecting Petitioner with the substantive offense—a fact impliedly recognized by the Court of Appeals, when, after announcing (3rd and 4th lines, R. 474) that it would later discuss the substantial evidence requiring submission to the jury under the substantive count, thereafter made no such discussion at all (R. 474-8), and indeed could not, because of the utter absence of such evidence. Therefore, *Pinkerton* v. *United States,* 328 U. S. 640, cited by the Government (11), is inapplicable, rendering the sentence imposed a double punishment.

3. As to the question of the value of the stolen property, facts which indisputably emerge are that (a) *full insurance of $4,600, based on cost or inventory, was determined, paid, and accepted for the loss* (R. 62, 209, 210); (b) *the property comprised sample watch cases made of base metal, some with works, others empty, used exclusively as samples in the soliciting of orders, and admittedly non-marketable* (R. 219; Government's Brief 13); (c) *a portion of the merchandise was, before any transportation, destroyed by a fire which apparently lasted several hours* (Government's Brief 7).

Accordingly, it was fundamental error to admit any evidence at all relating to a hypothetical retail value; and any discussion touching upon a purported retail value is irrelevant in view of the issues on this Petition, and is an avoidance of Question Presented III (Pet. 2). It is unquestioned that the maximum civil liability was determined, and recognized, at $4,600, and an entirely different and broader measure of value, based largely on conjectures, certainly should not be permitted to prevail for the purposes of a criminal prosecution.

Indeed, under the prosecution's reasoning, where gray or black markets actually exist supporting prices in excess

of those in the normal, or nominal, retail markets, a contention could even be asserted that the prices in such gray or black markets should control, as being more nearly representative of ultimate consumer values, thereby still further erroneously expanding the jurisdiction under the National Stolen Property Act.

4. The several authorities cited by the Government (16, 17) in support of its position that the sentence imposed does not warrant review, are all decisions of Courts of Appeals. From the citations in their respective texts, each appears as relying upon its predecessor, so that in effect they constitute only one independent decision. It does not appear that this Court has passed upon the general proposition here involved, other than to the extent appearing in *Weems* v. *United States,* 217 U. S. 349 (1910), making desirable a current, and perhaps more precise, determination.

For the reasons stated Petitioner's Brief (26, 27, 28), and appearing on the record, it is respectfully submitted that the imposition of the maximum sentence on each of the two counts, to run consecutively, is a gross and palpable abuse of discretion within the exception of the authorities cited by the Government, pages 16 and 17. As observed Petitioner's brief (27), the Record shows that sentence was imposed on the same day the verdict was rendered (R. 50, 51). But in actuality, with an impetuousness believed seldom paralleled under like circumstances in American jurisprudence, this inordinately harsh sentence was imposed within a very few minutes after such verdict, immediately following the jury's departure from the courtroom.

Banning Sequel

The Court of Appeals has found (R. 470), as is the fact, that Petitioner's "conviction was based principally upon the testimony of Herman Frank Banning, a co-defendant

under the indictment," and in its opinion cites liberally from such testimony (R. 470-2). The Government's brief admits (4, 5) that Banning was "the chief witness at the trial", and its Statement, at pages 5, 6, and 7, is comprised almost entirely of excerpts from his testimony, or of Court of Appeals findings predicated upon such testimony.

Banning was not only a co-defendant under the indictment, but is an ex-convict of long and vicious criminal career (R. 71, 72, 161, 165, 167, 170, 171, 200-4, 223), and at the time of his testimony was actually serving Federal sentence of 20 years (R. 161, 162, 183).

It will be recalled that subsequent to the conclusion of the trial herein, and on May 31, 1947, Banning was granted a pardon from the aforementioned Federal sentence of 20 years (Pet. 6; Brief 18). Sometime also subsequent to such conclusion, he was given a suspended sentence in the instant matter (Pet. 6; Brief 18). In testifying against Petitioner, Banning's sole motive apparently was to extricate himself from his desperate predicament, and he obviously cared little whether his testimony was true or not, so long as it served the purpose of liberating him. That purpose was achieved.

As further and conclusive indication of the thorough moral unreliability of this man, the Court's attention is invited to the fact that subsequent to the filing of this Petition for Certiorari, and on February 20, 1948, Banning and one Gizzi jointly held up and robbed two gasoline filling stations in Detroit, Michigan; that in endeavoring to escape after the second holdup, Banning and his confederate, from an automobile operated at high speed, engaged in a running gun battle with police for a distance of five miles in the side streets of Detroit, Banning very seriously wounding a Detroit policeman, and being himself also later wounded, and captured. In commenting, the Detroit press has carried

reports of admissions from official sources that Banning had been permitted to remain free because of the use to which he lent himself in connection with this proceeding against Petitioner, which reports have not been denied.

And so upon the self-fulfilling emanations of one so debased, uttered at this conspiracy trial, with two principal co-defendants who would have refuted them not produced, Petitioner, clean of any prior convictions, finds himself condemned to a sentence of punishment which in actual effect is not less than capital.

WHEREFORE, it is earnestly urged that this Petition for Certiorari should be granted.

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